UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

PATRICIA A. REYNOLDS,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 00-102-B-H
	)	
BAR HARBOR WHALE WATCH COMPANY,	)	
	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON DEFENDANT'S MOTION TO SET ASIDE DEFAULT AND MOTION FOR ORDER TO FILE LATE ANSWER

Before the Court is the Defendant's Motion to Set Aside Default and Motion for Order to File Late Answer. I now recommend that the Court deny Defendant's Motions and order that the Defendant be given a brief opportunity to conduct discovery on the issue of damages and present rebuttal testimony on damage issues and that the Court then adopt proposed findings of fact resulting from the continuation of the damages hearing commenced in front of me on November 17, 2000.

Background

This case presents a rather unusual factual and procedural background. Plaintiff, a resident of Ohio, was injured aboard Defendant's vessel on the waters of Frenchman's Bay off the town of Bar Harbor, Maine on September 28, 1998. She filed suit in this Court on May 22, 2000. The Defendant corporation was served by certified letter dated July 18, 2000, but Defendant did not respond to the waiver of service summons. On September 12, 2000, the clerk of the corporation was served in hand. On October 20,

2000, in response to Plaintiff's Application for Entry of Default, the clerk entered the Defendant's default.

On October 25, 2000, Plaintiff received notice that a damage hearing was set for November 17, 2000, before the Magistrate Judge. On October 26, 2000, Plaintiff's counsel attempted to notify the defaulted Defendant of the impending damages hearing. On November 13, 2000, counsel received word from the Hancock County Sheriff's Office that they had been unable to make service of the notice of hearing. Counsel then contacted the town clerk's office in Bar Harbor. Personnel in the clerk's office informed counsel that the corporation's clerk, Marc Brent, had moved to Marco Island, Florida. Counsel obtained a telephone number from information and left a message for Brent with the person who answered the phone.

On November 15, 2000, counsel for Defendant contacted Plaintiff's counsel for the first time. Immediately after that contact, Plaintiff's counsel attempted to contact Plaintiff in Ohio. As the trip from Ohio to Maine was anticipated to take two days and the hearing was set for 9:00 a.m., November 17, Plaintiff was en route by the time her counsel attempted to make phone contact. Both counsel then contacted me by telephone and I advised that the hearing set for November 17, 2000, would proceed as scheduled, denying the Defendant's request for a continuance as untimely. (Docket No. 5.)

On November 17, 2000, the damages hearing was held in front of me. Plaintiff and one other witness, her companion from Ohio who had been with her at the time of the accident, testified. I indicated to the parties that I would accept the testimony *de bene*, subject to it being stricken in the event the Default was set aside. I also advised Defendant that in the event the default was not set aside, I would give Defendant leave to

present rebuttal testimony on the issue of damages before I entered any proposed findings of fact.

On November 27, 2000, Defendant's Motion to Set Aside Default and File Answer Late was filed. Included in support of that motion was an affidavit of Christine Crawford, Boston Branch Manager of AI Marine Claims, Inc. According to Ms. Crawford, Defendant forwarded the suit to its local insurance agency in Camden, Maine, where it was received September 21, 2000. That agency forwarded the suit papers to American International Commercial Underwriting care of AIG Claim Services, Inc. in Boston, Massachusetts. The papers should have been directed to AI Marine Claims, which did not receive them until November 13, 2000. Defendant does not offer any other explanation for its failure to make timely response.

Standard of Review

To overturn the default, Defendant has the burden of showing "good cause." Fed. R. Civ. P. 55 (c). The good cause threshold for relief from default is lower and more easily overcome than the showing necessary for relief from judgment under Fed. R. Civ. P. 60(b). *See Coon v. Grenier*, 867 F.2d 73, 76 (1st Cir. 1989). When considering whether to allow an entry of default to be set aside, the rules of procedure should be applied not "grudgingly", *id.*, but with an eye "to secur[ing] the just . . . determination of every action", Fed. R. Civ. P. 1. The First Circuit has enumerated some general guidelines that have universal application and warrant consideration in determining whether a default should be set aside: "(1) whether the default was willful; (2) whether setting it aside would prejudice the adversary; (3) whether a meritorious defense is presented; (4) the nature of the defendant's explanation for the default; (5) the good

faith of the parties; (6) the amount of money involved; and (7) the timing of the motion." *McKinnon v. Kwong Wah Rest.*, 83 F.3d 498, 503 (1st Cir. 1996).

Discussion

In order to properly exercise discretion in determining whether to set aside default, it is important to remember that as a general principle actions should ordinarily be resolved on their merits. *See Coon*, 867 F.2d at 76. By the same token, the Court also has a substantial interest in insuring that parties abide by deadlines and that the Court's calendar not be "discommod[ed]" by defaulting defendants appearing at the last possible moment. *Id.* When the *Kwong Wah* factors are applied to the facts of this case, I conclude that the Defendant has failed to show good cause to set aside its default.

1. Whether the default was willful

In the present case Defendant clearly had actual notice of the pending lawsuit. Service occurred twice, by mail in July and again in hand in September. Defendant Bar Harbor Whale Watch Co., although not so dilatory as the defendants in *Kwong Wah*, chose not to "follow up" in any way after forwarding notice of the suit to its insurer. This case involves a corporate defendant and its insurer, both inured to the commercial world. Either, or both, should have been alert to deadlines set in official legal documents. "A defendant's conduct has been determined to be 'culpable' if he has received actual or constructive notice of the filing of the action and failed to answer." *See Hunt v. Kling Motor Co.*, 841 F. Supp. 1098, 1106 (D. Kan. 1994) (quoting *Pena v. Seguros La Comercial, S.A.*, 770 F.2d 811, 814 (9th Cir.1985)). Defendant clearly received notice of this lawsuit and failed to ascertain whether his insurer would provide a defense. Unlike the defaulting defendant in *Coon v. Grenier*, there were no circumstances preventing

Defendant from taking action until after the entry of default. *See Coon*, 867 F.2d at 76-77. In this sense, Defendant's conduct can be termed willful.

2. Whether setting default aside would prejudice the adversary

Plaintiff has not shown that she would suffer any real prejudice if the default were set aside. She complains about the expenses that she and her companion incurred traveling to Maine, but those expenses do not amount to prejudice in any legal sense.[1] She has not shown that the passage of time has caused witnesses to disappear or evidence to be lost, which would truly amount to prejudice. Although this factor appears to weigh in Defendant's favor, I would view it as relatively neutral on these facts. If great weight were given to this consideration, a Defendant could always ignore a court summons until he got around to answering it without consequence unless something dire happened to Plaintiff's case in the interim.

3. Whether a meritorious defense is presented

This case involves an allegation of negligence on the part of a sea captain. Defendant maintains that Plaintiff's injuries resulted from an unavoidable accident and that the captain did not act negligently in turning the vessel into waves. The law of negligence applied on the high seas is akin to the law of negligence on land. *See Muratore v. M/S Scotia Prince*, 845 F.2d 347, 353 (1st Cir. 1988) ("It is axiomatic in maritime law that a carrier owes a duty of exercising reasonable care toward its passengers under the circumstances."). Clearly there is a "meritorious defense" here in the sense that assessing the reasonableness of conduct under the circumstances is almost

[1] In the event the Court ultimately determines that the default should be set aside, I would recommend that Plaintiff be allowed to recover the actual expenses incurred by her and her traveling companion in attending the damages hearing and the attorney fees associated with the entry of default and damages hearing. *See Coon*, 867 F.d2d at 79.

always a question of fact which must be determined by a factfinder. However, contrary to Defendant's argument, Plaintiff has pled acts of negligence on the part of Defendant and those pleadings are a sufficient basis to support a finding of negligence. This factor is in Defendant's favor in terms of setting aside the default, but not overwhelmingly so.

4. The nature of defendant's explanation for the default

Defendant offers little explanation for the default. Papers, in the custody of Defendant's agents, were mislaid. The parties involved, insurance agents and insurance companies, deal with litigation all the time. Defendant itself gives no explanation as to why it did not inquire about whether or not its insurer had undertaken a defense in this matter. Nor does anyone offer an explanation why the Commercial Underwriting Department of AIG was incapable of either returning the papers to the sender or forwarding them to the appropriate office for close to two months and then did so only at the eleventh hour and only after the considerable efforts of Plaintiff's counsel apparently, somehow produced a response. The situation is similar to the facts presented in *Park Corp. v. Lexington Ins. Co.*, 812 F.2d 894 (4th Cir. 1987), in that the affidavit of Ms. Crawford gives no explanation other than that the complaint never reached the appropriate claims department. *See id*. at 897 ("Because Lexington could give no reason for the loss of the complaint, the district court could not determine whether it had an acceptable excuse for lapsing into default.").

Although *Lexington* was a case decided under Rule 60(b) because the default judgment had actually entered, that fact does not negate its applicability to this situation. The standard under Rule 55(c) is that Defendant show "good cause." In the present case, Defendant chose to rely totally upon its agents and insurers to handle its defense.

Defendant does not submit an affidavit evidencing that he made inquiry and was assured that the matter was being handled by those to whom he referred the complaint. On this record it appears that Defendant mailed the complaint and made no further inquiry until November 13, if indeed he did so then, in response to plaintiff counsel's telephone call. Furthermore, the insurer does not present an affidavit explaining the cause for the almost 60-day delay in underwriting. The only explanation given is it did not get to Ms. Crawford until November 13. To say that Defendant has shown good cause on this record would be tantamount to allowing "defaulting defendants to escape the consequences of their inaction simply by asserting that the legal process to which they failed to respond was lost." *Id.*

5. The good faith of the parties

I consider this factor to have little application to these facts. It is apparent that both parties have acted in good faith in this matter. Plaintiff's counsel has made considerable efforts to insure that Defendant received notice of the lawsuit and the damages hearing. Defendant's default is willful only in that he knew of the suit and did not respond; his error and that of his agents, although grossly negligent, was not in bad faith.

6. The amount of money involved

Plaintiff presents a lost wages claim of $3,387.75 and $12,714.68 in medical expenses, in addition to pain and suffering claims and permanent impairment claims. Although she invokes this Court's diversity jurisdiction as well as admiralty or maritime jurisdiction in her complaint, her claim certainly does not involve a large amount of money when compared with some litigation in this court.

7. The timing of the motion

I consider this factor to be most crucial in this case. Defendant made the motion to set aside the default more than four months after learning of the lawsuit and only after this Court had already scheduled a damages hearing. Although the less strict Rule 55(c) standard is technically applicable to this case, the timing of the motion has resulted in the parties and the court expending effort commensurate with the entry of a default judgment prior to a decision on this motion. Although the damages hearing set for November 17, 2000, could have been continued by the Court if Defendant had appeared even one week earlier, it would have been unfair to continue the hearing on such short notice when Plaintiff was already on her way to Maine. Furthermore, at the point the Court was asked to continue the hearing, no motion to set aside default had yet been filed and the Court did not even have the unsatisfactory explanation from Ms. Crawford to consider in determining whether or not there was a likelihood that the default would be set aside. Although I do not mean to suggest that counsel for the Defendant was dilatory in filing the Motion to Set Aside Default, indeed it was filed within the time limit set by this Court after the entry of counsel's appearance, the inevitable result of Defendant's timing was to substantially disrupt both the Court's orderly disposition of this case and the Plaintiff's preparations. I do not believe that it is appropriate to lift the default under those circumstances.

Conclusion

Based upon the foregoing, I recommend that the Motion to Set Aside the Default and for Order to File Late Answer be **DENIED.** I also recommend that the Defendant be given a brief opportunity to present rebuttal testimony at a continuation of the damages

hearing, and at the conclusion of that hearing that the Court consider proposed findings of fact submitted to it and enter judgment accordingly.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

_____
Margaret J. Kravchuk
U.S. Magistrate Judge

Dated: January 9, 2001

STNDRD

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 00-CV-102

REYNOLDS v. BAR HARBOR WHALE Filed: 05/22/00
Assigned to: JUDGE D. BROCK HORNBY Jury demand: Plaintiff
Demand: $0,000 Nature of Suit: 340
Lead Docket: None Jurisdiction: Diversity
Dkt# in other court: None

Cause: 28:1332 Diversity-Personal Injury

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